No. 09-1131

Supreme Court, U.S.
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In The
Supreme Court of the United States

DOUG MORGAN, ET AL.,

Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF LYNN SWANSON AND JACKIE BOMCHILL TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether public school students are provided greater free speech rights to distribute literature in public schools during the school day than this Court generally permits to adult citizens in public forums.

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SUMMARY

In keeping with this Court's holding in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the United States Court of Appeals for the Fifth Circuit upheld a content-neutral, time-place-manner restriction on the distribution of written materials. Petitioners and their amici, however, try to obfuscate the issues present in this appeal by relying on mere allegations of religious and viewpoint discrimination when there is no evidence in the summary judgment record to support the allegations and when those allegations have nothing to do with the issues addressed in the summary judgment record, viz., the facial constitutionality of a school district's written policies.

This is an interlocutory appeal of a decision regarding Petitioners' facial challenge to the constitutionality of Plano Independent School District's ("the School District") policies regulating the time, place and manner of student distribution of non-curricular materials during the school day. No discovery was conducted regarding Petitioners' allegations of religious and viewpoint discrimination and no evidence was included with the summary judgment record to substantiate those allegations. Petitioners' request for review is improperly based on mere allegations, which are unsupported by the summary judgment record and which were never decided below. As the Court of Appeals noted, granting interlocutory review of Petitioners' facial challenge was inadvisable in light of the remaining disputes regarding Petitioners'

as-applied (religious and viewpoint discrimination) claims. The procedural posture of the case counsels strongly against review at this time.

The Court of Appeals' decision is consistent with this Court's approval of time-place-manner restrictions on literature distribution and, as a result, should not be disturbed. To the extent that this litigation raises issues that might warrant review by this Court, this Court would be well advised to wait for a more appropriate time both in terms of the development of the record and the procedural posture of the case.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

This is an appeal from a decision regarding Petitioners' and Plano Independent School District's ("the School District") cross-motions for summary judgment on the facial constitutionality of the School District's district-wide policy imposing time, place and manner restrictions on the distribution of non-curricular materials at school during the school day by students. There is no evidence of religious discrimination or viewpoint discrimination in the summary judgment record. Petitioners allege religious discrimination and viewpoint discrimination in their complaint, but those allegations are not part of the summary judgment record. *See, e.g.*, R.908 [Plaintiffs'

Motion and Brief in Support of Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies)] ("This summary judgment motion does not seek summary judgment on the *application* of these policies to the plaintiffs" (emphasis in original)).

Petitioners brought suit against the School District and various school officials, including Respondents Principal Lynn Swanson ("Swanson") and former Principal Jackie Bomchill ("Bomchill"), in December of 2004. Pet. App. 33. In 2005, after Petitioners brought suit, the School District amended its policy and expanded students' opportunities to distribute non-curricular materials at school. Pet. App. 33-38.[1] Petitioners allege that both the earlier policy and the amended policy are facially unconstitutional. Pet. App. 38. In addition, Petitioners allege that the earlier policy was applied in an unconstitutional manner. R.1536 [Second Am. Compl. ¶1.16]. Specifically, Petitioners allege that school officials practiced religious or viewpoint discrimination against Petitioners in the application of the earlier policy. Pet. 5. Petitioners have not alleged any religious or viewpoint discrimination in the application of the amended policy. *Cf.* R.2812.

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[1] For the sake of consistency, Respondents follow Petitioners in referring to the policy in place before 2005 as the earlier policy and the later policy as the amended policy. *See* Pet. 10.

Pending resolution of Petitioners' and the School District's cross-motions for summary judgment on the facial constitutionality of the earlier and amended policies, no discovery on any issues, including Petitioners' religious and viewpoint discrimination allegations, has been conducted. The magistrate judge issued a report recommending that the district court deny Petitioners' motion for summary judgment and grant the School District's motion. Pet. App. 24; 28 U.S.C. § 636(b)(1)(B). The magistrate concluded that Petitioners' challenge to the earlier policy was moot because it had been amended and that the amended policy should be upheld under *United States v. O'Brien*, 391 U.S. 367 (1968). Pet. App. 24-59. Petitioners filed objections to the magistrate's report. R.2844; 28 U.S.C. 636(b). The district court affirmed the magistrate's report and recommendations, except as to one provision of the amended policy, which the district court held violated the First Amendment. Pet. App. 17-20; 28 U.S.C. § 636(b).

Over the objection of Respondents Swanson and Bomchill, the district court certified Petitioners' facial challenge to the School District's policies for immediate appeal to the United States Court of Appeals for the Fifth Circuit. Pet. App. 21-23; R.3780-81. The Court of Appeals, while noting that the district court should not have certified the case for interlocutory appeal while qualified immunity motions to dismiss are pending, affirmed in part and reversed in part the decision of the district court. Pet. App. 14 and 4 n.5. The Court of Appeals held that the earlier policy was

not moot and remanded that portion of the case to the district court for consideration on its merits. Pet. App. 13-14. The Court of Appeals also upheld the amended policy, holding that it is a reasonable time, place and manner restriction. Pet. App. 10-13.

The earlier policy has been remanded to the district court, Petitioners and the School District have provided additional briefing on the constitutionality of the earlier policy, and the magistrate judge has issued a new report, recommending that the district court deny summary judgment on the earlier policy until the parties have had the opportunity to develop the evidentiary record. Still, five and a half years into this litigation, no discovery has been conducted and no efforts have been made to develop an evidentiary record that would substantiate Petitioners' allegations of religious and viewpoint discrimination. Nevertheless, Petitioners repeatedly claim in their Petition that religious and viewpoint discrimination *actually occurred* in the School District under the earlier policy. *See, e.g.*, Pet. 5-8. This is a serious, implicit misrepresentation of the record. The summary judgment record contains *no evidence* to support Petitioners' allegations, which are implicitly and improperly presented to this Court as established facts. Moreover, in addition to implicitly misrepresenting allegations as if they were established facts, Petitioners have improperly and implicitly misrepresented these mere allegations as relevant facts when the truth is that the allegations of religious and viewpoint discrimination have nothing

allegations or denials in its own pleading"). Instead, Petitioners attempt to raise these new arguments regarding religious and viewpoint discrimination on appeal without providing the defendants any opportunity to conduct discovery on Petitioners' allegations or offer any evidence to refute their claims.

Petitioners attempt to rely on unverified allegations that are not part of the summary judgment evidentiary record appears to be a blatant attempt to inflame this Court to grant review on a case that is otherwise undeserving of consideration.[3] This Court should deny the petition for writ of certiorari.

B. The Procedural Posture of the Case Counsels Against Granting the Petition.

Petitioners request for review should not be granted because not all of the facts that Petitioners believe are essential to determination of the case are properly before this Court. Petitioners purport to seek review of allegations of religious and viewpoint discrimination that have not been adjudicated and are not part of this appeal. This appeal is an appeal

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[3] To that end, Petitioners have included in their appendix a report from the magistrate judge that has no bearing on this appeal. Appendix F in Petitioners' appendix is a report and recommendation from the magistrate judge on a motion to dismiss filed by some of the school official defendants. Pet. App 60. This appeal does not seek review of the magistrate's report and recommendation on the school officials' motion to dismiss. Pet. App. 21.

from an interlocutory decision on a facial challenge and includes no evidence of religious or viewpoint discrimination.

This appeal results from a certification by the district court pursuant to Federal Rule of Civil Procedure 54(b). Pet. App. 21 [Order Granting Motion to Certify Court Order as Final]. However, as the Court of Appeals noted, the justification for granting Rule 54(b) certification is dubious in light of the pending as-applied challenges and assertions of qualified immunity.

> While deferring to the judgment of the district court, we remain dubitante over the efficiency of separating the claims into separate appeals, an effort further complicated by the later denial of qualified immunity to individual defendants. The effort to confect an efficient appeal is commendable in concept although here perverse in execution.

Pet. App. 4 n.5. Petitioners clearly believe that their allegations of religious and viewpoint discrimination are central to their case, but those allegations will not be before this Court if it grants review. There is no procedural reason why this Court must grant review of this case at this time in order to address the legal issues raised by Petitioners. *Cf. Teague v. Lane*, 489 U.S. 288, 296 (1989) ("law of the case" doctrine does not apply to this Court's post-trial review of pre-trial decisions by court of appeals). Instead, to the extent the Court believes that issues argued by Petitioners

should be reviewed, the Court should wait for an appeal that properly presents those issues.

II. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE.

A. Petitioners Propose Granting Greater First Amendment Rights to Public School Students Than Are Generally Provided to Adult Citizens in Public Forums.

"The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (upholding time, place and manner restrictions on leafleting in a public forum). In *Heffron*, this Court upheld a restriction on the distribution of literature that limited distribution activities to one location within the State Fair grounds. *Id.* at 647-48. Petitioners, however, propose that this Court should adopt a heightened standard for public schools. Petitioners propose that, instead of applying the time-place-manner or *O'Brien* test to content-neutral regulations of the distribution of non-curricular materials in public schools, this Court should apply the heightened "material and substantial disruption" standard set forth in *Tinker v. Des Moines Independent Community School District*, 393

U.S. 504 (1969).[4] Petitioners have not, however, explained why public school students should have greater free speech protections than this Court provides to adult citizens in public forums.

B. The Petition Does Not Reach the First Amendment Issue that Actually Exists in this Litigation.

This litigation raises an important First Amendment issue, but it is one that is not raised by Petitioners. Various courts of appeals and commentators, including counsel of record for amicus curiae The American Center for Law and Justice, have noted the lack of clarity in this Court's jurisprudence regarding the application of the First Amendment in elementary schools. *See, e.g., Walker-Serrano v. Leonard*, 325 F.3d 412, 417-18 (3d Cir. 2003) ("In any event, if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited. Elementary school officials will undoubtedly be able

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[4] For purposes of preserving their argument under Supreme Court Rule 15.4, Respondents note that Justice Alito's concurring opinion in *Morse v. Frederick*, 439 U.S. 1114 (2007), is not the controlling opinion. Petitioners cite to *Marks v. United States*, 430 U.S. 188, 193 (1977), for the proposition that the opinion with the narrowest ground is controlling. Petitioners' reliance on *Marks* is misplaced because *Marks* addresses decisions in which no one opinion garnered "the assent of five justices" *Id.* The majority opinion in *Morse* had the assent of five justices. In addition, Justice Thomas concurred in the result on even broader grounds.

to regulate much – perhaps most – of the speech that is protected in higher grades."); *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 466 (7th Cir.) ("We have our doubts whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders."), *cert. denied*, 552 U.S. 976 (2007).[5] Both Petitioners and the School District have largely ignored the difference in the application of the First Amendment in the elementary versus secondary context since that issue has little bearing on the evaluation of the district-wide policy under *Tinker* or *United States v. O'Brien*, 391 U.S. 367 (1968). However, all of Petitioners' as-applied challenges involve elementary school students and, if properly raised in an appeal, would present a more worthy question and record to review.

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[5] *See also* Jennifer L. Specht, Note, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313, 1331-1332 (2006) ("*Tinker*'s failure to address the age issue should not be seen as a mere omission, but as an exclusion of its application to elementary students."); Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1072 (1995) (Noting that "*Tinker* itself dealt with the speech rights of high school and junior high school students [and proposing] guidelines [to] extend the *Tinker* standard to elementary schools.").